BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NICHOLAS WEATHERMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,000,481
WEATHERMAN'S	)	
Respondent	)	
AND	)	
	)	
PATRON'S INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier initially appealed the March 17, 2003 Award entered by Administrative Law Judge Jon L. Frobish. Later, claimant also filed an appeal. The Board heard oral argument on September 4, 2003.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Scott J. Mann of Hutchinson, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties also agree the record includes the transcript from claimant's February 20, 2003 deposition at which the parties completed the regular hearing and includes the transcript from Dr. Bradley W. Bruner's February 20, 2003 deposition.

ISSUES

Claimant alleges that he injured both knees while working for his father's floor covering business from July 2000 through March 11, 2001. Claimant also alleges a specific injury to the left knee on March 11, 2001.

In the March 17, 2003 Award, Judge Frobish determined that claimant sustained a two percent whole body permanent functional impairment due to his bilateral knee injuries.

The Judge also determined claimant failed to make a good faith effort to find employment post-injury. Therefore, the Judge imputed a post-injury wage of $206 per week finding that claimant had sustained a 36 percent wage loss due to his injuries. Averaging the 36 percent wage loss with a 31 percent task loss, the Judge awarded claimant benefits for a 33.5 percent permanent partial general disability. The Judge also determined claimant's average weekly wage on the date of accident was $560.

Claimant contends Judge Frobish erred. Claimant argues that his average weekly wage is $726.50, which is comprised of $560 in base wages, $66.50 in mileage reimbursement and $100 in bonus. Regarding permanent disability benefits, claimant argues that he has made a good faith effort to find appropriate employment and, therefore, he has a 100 percent wage loss as he is presently unemployed. Additionally, claimant argues that he has either a 44 percent or 50 percent task loss for either a 72 percent or 75 percent work disability.

Respondent and its insurance carrier also contend Judge Frobish erred. They admit that claimant injured his left knee while working for respondent but they contest that claimant's right knee complaints are also related to his employment with respondent. Respondent and its insurance carrier also argue that claimant was a part-time hourly employee as he neither worked, nor was expected to work, 40 or more hours per week. They contend claimant's pre-injury average weekly wage was only $355.90 per week. Finally, they argue that the Judge should have awarded claimant only 23.57 weeks of temporary total disability benefits at $237.39 per week.

Accordingly, respondent and its insurance carrier request this Board to modify the March 17, 2003 Award and limit claimant's award to one for a scheduled injury to the left lower extremity. In the alternative, they ask the Board to limit claimant's permanent partial general disability to claimant's whole body functional impairment rating as claimant would be earning a comparable wage if he put forth a good faith effort to find appropriate employment. They also request the Board to limit the award of temporary total disability benefits to 23.57 weeks and reduce claimant's average weekly wage from $560 to $355.90.

The issues before the Board on this appeal are:

1. What is claimant's average weekly wage for purposes of this claim?

2. How many weeks of temporary total disability benefits is claimant entitled to receive?

3. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the Award should be modified as set forth below.

1. What is claimant's average weekly wage?

The Judge determined that claimant's average weekly wage for purposes of this claim was $560, which was based upon $14 per hour for a 40-hour workweek. The Judge denied claimant's request to include as a bonus the fair market value of the furniture that claimant's father gave claimant in January 2002. The Judge also denied respondent and its insurance carrier's request to calculate claimant's average weekly wage as if he were a part-time worker. The Board affirms the Judge's finding that claimant's average weekly wage was $560.

The Board finds that claimant's father hired claimant to work on a full-time basis. Accordingly, claimant was expected regularly to work at least 40 hours per week, depending, of course, upon whether respondent could obtain sufficient work. The Act defines part-time and full-time workers in K.S.A. 44-511(a) as follows:

> (4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
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> (5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

Accordingly, claimant's weekly base wage is based upon a minimum of 40 hours, which is multiplied by the $14 per hour that respondent's wage records indicate that he earned. Multiplying $14 per hour by 40 hours yields a weekly base wage of $560.

Claimant requests that his base wage should be increased as the result of a bonus received in the form of furniture. The Board disagrees. The Act provides that bonuses, which are defined as additional compensation, paid in cash within the one year preceding the date of accident be included in computing the injured worker's average weekly wage. The Act also provides that remuneration given in any medium other than cash shall be valued in terms of the average weekly cost to the employer of such remuneration. Finally, the Act provides that additional compensation items are only included in computing the average weekly wage once those items are discontinued. K.S.A. 44-511(a)(2) provides:

> The term "additional compensation" shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

As claimant's alleged bonus was paid in furniture, the provision regarding cash bonuses does not apply and claimant cannot include the fair market value of the furniture in calculating the average weekly wage under that provision. Moreover, in the event bonuses in the form of property were part of the average weekly wage under K.S.A. 44-511(a)(2)(B), only those bonuses paid before the accident would be included in computing the average weekly wage.

The Board questions whether K.S.A. 44-511(a)(2)(D) is applicable where a worker is claiming property as a belated bonus. In any event, that provision requires a worker to prove the respondent's average weekly cost of the remuneration claimed, which claimant failed to prove. Fair market value is not the equivalent of an employer's cost.

Claimant also requested that any amounts that his father paid him for mileage reimbursement be included in the average weekly wage computation. The Board finds that the record fails to establish what amounts, if any, respondent paid claimant for mileage expense reimbursement. William Weatherman, III, claimant's father, presented a wage statement at his deposition. That wage information fails to show that respondent paid claimant any money for mileage reimbursement. Moreover, claimant failed to introduce any documentation that he received mileage reimbursement from his father.

Based upon the above, claimant's average weekly wage for purposes of this claim is $560 per week.

2. How many weeks of temporary total disability benefits is claimant entitled to receive?

Claimant contends that he is entitled to receive more than the 33.86 weeks of temporary total disability benefits that respondent and its insurance carrier paid during the pendency of this claim. Conversely, respondent and its insurance carrier contend that claimant was entitled to receive only 23.57 weeks.

The Board finds that on August 23, 2001, claimant was released from medical treatment and released to return to work by his authorized treating physician, Dr. Bruner. Claimant has failed to prove that he was unable to work in any substantial or gainful employment after that date and, therefore, clamant's temporary total disability benefits should have ceased at that time. The greater weight of the evidence indicates that claimant had permanent work restrictions after August 2001, but that he could have performed work that did not violate Dr. Bruner's restrictions against kneeling, crawling and climbing ladders.

Based upon the above, claimant is entitled to receive temporary total disability benefits for the period from March 11, 2001, through August 23, 2001, which is a period of 23.57 weeks.

3. What is the nature and extent of claimant's injuries and disability?

As indicated above, the Judge determined that claimant had sustained a 33.5 percent permanent partial general disability as a result of bilateral knee injuries claimant sustained while working for respondent. For the reasons below, the Board concludes that claimant sustained a 43 percent wage loss and a 38 percent task loss, which yield a 41 percent permanent partial general disability.

The Board finds that claimant has established that he sustained permanent bilateral knee injuries due to the work that he performed for his father's company, who is the

respondent in this claim. Accordingly, claimant is entitled to receive permanent partial general disability benefits under the formula set forth in K.S.A. 44-510e.

The parties do not contest that in approximately January 2001 claimant began working for his father as an employee installing tile and other floor coverings. Before January 2001, however, claimant worked for his father but he was considered to be an independent contractor. Claimant's job duties with respondent required him to repetitively kneel and crawl, which claimant sometimes did without knee pads.

The respondent and its insurance carrier do not contest that claimant injured his left knee while working for respondent, but they do contest that claimant sustained injury in his right knee either directly due to the work that he performed for respondent or as a natural consequence due to overcompensating for the left knee injury.

Claimant last worked for respondent on March 11, 2001. On that date claimant was kneeling on both knees without wearing knee pads repairing and installing tile and grout. The greater weight of the evidence establishes that claimant was experiencing symptoms in both knees as a result of the kneeling and crawling that he was performing at work. Claimant testified that on March 11, 2001, his left knee symptoms were much worse than the right knee symptoms. And claimant's father testified that on March 11, 2001, claimant reported the bilateral knee injuries to him stating that one of the knees was worse than the other. Claimant also testified that he attempted to obtain medical treatment for his right knee but was told at the doctor's office that they were only authorized to treat the left knee. Medical notes dated July 12, 2001 indicate that claimant was complaining of right knee pain to the doctor who was authorized to treat the left knee.

The evidence also establishes that the injury to the left knee was severe enough to cause claimant to compensate by shifting more weight to the right knee while standing or walking. Accordingly, it is logical to conclude that claimant's right knee symptoms were aggravated by the left knee injury. In fact, one of claimant's treating physicians, Dr. Bradley W. Bruner, diagnosed claimant as having right knee compensatory tendinitis, which was caused from favoring the left knee.

The Board finds that claimant's bilateral knee injuries were caused by the kneeling and crawling that he performed for respondent. Moreover, even if claimant's right knee injury had been primarily caused by compensating for the injured left knee, the results in this claim would not be altered as the right knee injury would have comprised a natural and direct result of the initial accident and, therefore, be compensable under the Workers Compensation Act.

Dr. Bradley W. Bruner, who treated claimant's left knee initially from approximately June 2001 through August 2001 but later saw claimant for additional complaints, rated

claimant's left knee as comprising a five to eight percent functional impairment to the lower extremity under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). But Dr. Bruner, despite claimant's complaints, neither treated nor rated the right knee as he was never authorized to treat that knee. Dr. Bruner last saw claimant in March 2002.

Dr. Philip R. Mills, who initially saw claimant in April 2002 at the Judge's request and who also treated claimant, diagnosed claimant as having developed bilateral patella tendinitis from repetitively kneeling at work, which comprised a two percent whole body functional impairment according to the AMA *Guides* (4th ed.). Dr. Mills last saw claimant in December 2002.

Finally, Dr. Pedro A. Murati, whom claimant's attorney hired for purposes of this claim, evaluated claimant in April 2002 and determined that claimant had sustained a three percent whole body functional impairment due to his bilateral knee injuries, which the doctor diagnosed as left knee patellofemoral syndrome and right knee patellar tendinitis. Dr. Murati also included a rating for claimant's back but the Board finds that claimant has failed to prove that it is more probably true than not that claimant injured his back as a result of his work activities.

Considering the various expert medical opinions, the Board finds that claimant's bilateral knee injuries comprise a two percent whole body functional impairment. Although the permanent functional impairment rating for the bilateral knee injuries is small, the effects of the injuries are considerable as claimant is unable to perform his trade installing floor coverings. And that is a significant loss to this claimant who has few other skills, limited work experience outside the floor covering business and an eleventh grade education.

As March 11, 2001, was the last day that claimant sustained injuries while working for respondent, that date is designated as the appropriate date of accident for purposes of computing claimant's workers compensation benefits.[1] The formula for permanent partial general disability benefits for that accident date is set forth in K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost**

[1] See *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

> **the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

The Kansas Court of Appeals in *Watson*[5] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[6]

The Judge was not convinced that claimant made a good faith effort to find appropriate employment and, therefore, imputed a post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula. The Board agrees that a post-injury wage should be imputed but for reasons other than those cited by the Judge.

When considering the entire record, the Board is not convinced that claimant's efforts in his job search are entirely genuine. When claimant first testified in this claim in October 2001, he had been released from medical care by Dr. Robert Eyster in May 2001 and released from treatment by Dr. Bruner on August 23, 2001, but he had not begun to look for other work as he wanted "to see where this [claim] goes."[7] And once claimant did begin looking for work, he initially limited his contacts to Internet sites until April 2002, when he began receiving job placement assistance from Total Success Services, Inc.

One of the reasons that claimant initially gave at his October 2001 deposition for not looking for work following those medical releases was because he had to babysit his children while his wife worked one hour per day. Additionally, claimant indicated in October 2001 that he wanted a job making around $15 per hour. Claimant testified, in part:

> Q. (Mr. Mann) That's what I'm trying to get at. You indicated --
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> A. (Claimant) If I can get a job, you know, like working for $15.00 an hour, but I'm not going to flip burgers when I need $1,500.00. I have to get divorced, you know. I'm worried about going through bankruptcy because of this crap.
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> Q. My question isn't that, sir, my question is: What efforts have you made to find a job since being released from the doctor?
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> A. None.

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[6] *Id.* at Syl. ¶ 4.

[7] Claimant's Depo. (Oct. 15, 2001) at 54.

> Q. And why not?
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> A. Because I don't have a high school diploma, and I believe the statistics are, if I don't have a high school diploma, is you're working fast food, minimum wage, and that isn't something, an option, especially when you make $15.00 an hour, $20.00 an hour. I'm not going to knock myself down over that.[8]

Claimant also testified at the November 2002 regular hearing that he was then working part-time at Sears selling vinyl windows, doors and siding and that, if he so desired, he could move to clothing or electronic sales. But towards the end of December 2002, claimant terminated his Sears job selling vinyl windows and siding because he was certain he would be terminated for failing to meet a quota. The record does not disclose the reason claimant did not transfer into the electronic or clothing departments.

The record establishes that claimant failed to follow the advice from vocational rehabilitation counselor Monty Longacre to register with Job Service, which is a state agency that collects and compiles job listings. Claimant and Mr. Longacre met and talked in late January 2003. But when claimant testified on February 20, 2003, to conclude his regular hearing testimony, claimant had still not registered with the state agency.

In addition to failing to register with the state for job listings, the record establishes that following October 2002 claimant had not recontacted the temporary employment agency that had placed him in two temporary jobs before he began working for Sears.

The Board also notes claimant's testimony regarding efforts to obtain his GED. In October 2001, claimant testified that he was studying for his GED over the Internet. And at the March 2002 preliminary hearing, claimant testified that he was obtaining his GED the next day.[9] Additionally, at the November 2002 regular hearing claimant testified that he had been taking night school classes for approximately seven months and that he would have obtained his GED two weeks before but his grandfather had passed away. And when claimant met with Mr. Longacre in late January 2003, he still had not obtained his GED and told Mr. Longacre that he would be able to complete it sometime the next month. But when claimant testified in late February 2003, nothing was said about the status of clamant's GED.

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[8] Claimant's Depo. (Oct. 15, 2001) at 57-58.

[9] Despite the testimony that claimant was obtaining his GED the next day, the Board believes it is more accurate that claimant was going to meet with an SRS representative the next day to discuss his GED.

Although the total number of job contacts that claimant has made is impressive,[10] the Board is not persuaded that claimant has made a genuine effort to find appropriate employment in light of claimant's testimony that indicated he was really only interested in jobs that paid $15 per hour. Accordingly, the Board will impute a post-injury wage of $320 per week, which is based upon Mr. Longacre's analysis that claimant retains the ability to earn $8 per hour. When averaged with claimant's pre-injury wage of $560 per week, the Board finds that claimant has sustained a wage loss of 43 percent due to his bilateral knee injuries.

When considering only non-duplicative work tasks, the Board concludes that claimant has lost the ability to perform 38 percent of the job tasks that he performed in the 15-year period before developing the bilateral knee injuries.

According to Dr. Bruner, who restricted claimant from kneeling, squatting, climbing ladders, laying carpet and laying other floor coverings and who reviewed the list of former work tasks prepared by human resources expert Jerry Hardin at claimant's attorney's request, claimant has lost the ability to perform nine of 18 former tasks for a 50 percent task loss. On the other hand, Dr. Mills, who believes claimant should avoid kneeling and especially avoid crawling, determined claimant lost the ability to perform five of the 25 former tasks, or 20 percent, listed by Mr. Longacre and, in addition, testified that claimant lost the ability to perform four of 18 tasks, or 22 percent, after reviewing Mr. Hardin's task list. And finally, Dr. Murati indicated that claimant had lost the ability to perform 10 of 18, or 56 percent, former work tasks after reviewing Mr. Hardin's task list.

The Board finds that claimant's task loss falls somewhere between 20 and 56 percent. Accordingly, the Board averages those percentages and concludes that claimant has lost the ability to perform approximately 38 percent of the work tasks that he performed in the 15 years before his bilateral knee injuries.

Averaging claimant's 43 percent wage loss with the 38 percent task loss percentage yields a 41 percent permanent partial general disability.

AWARD

WHEREFORE, the Board reduces the temporary total disability weeks from 33.86 to 23.57 and increases the permanent partial general disability from 33.5 percent to 41 percent.

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[10] When claimant testified on February 20, 2003, claimant introduced a list of contacts that he had made from April 2002 through February 2003, including 139 contacts either in person or by telephone, 28 contacts by facsimile and 65 contacts over the Internet.

Nicholas Weatherman is granted compensation from Weatherman's and its insurance carrier for a March 11, 2001 accident and resulting disability. Based upon an average weekly wage of $560, Mr. Weatherman is entitled to receive 23.57 weeks of temporary total disability benefits at $373.35 per week, or $8,799.86, plus 166.64 weeks of permanent partial general disability benefits at $373.35 per week, or $62,215.04, for a 41 percent permanent partial general disability and a total award of $71,014.90.

As of September 10, 2003, Mr. Weatherman is entitled to receive 23.57 weeks of temporary total disability compensation at $373.35 per week in the sum of $8,799.86, plus 106.86 weeks of permanent partial general disability compensation at $373.35 per week in the sum of $39,896.18, for a total due and owing of $48,696.04, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $22,318.86 shall be paid at $373.35 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Scott J. Mann, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director